No. 16-1363

IN THE

# Supreme Court of the United States

KIRSTJEN M. NIELSEN,
Secretary of Homeland Security, *et al.*,
*Petitioners*,

*vs.*

MONY PREAP, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether a criminal alien becomes exempt from mandatory detention under 8 U. S. C. § 1226(c) if, after the alien is released from criminal custody, the Department of Homeland Security does not take him into immigration custody immediately.

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## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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### INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The Ninth Circuit in this case gave the mandatory detention provision of the Immigration and Nationality Act a strained reading that would effectively nullify it in all cases where a deportable alien criminal was not taken into immigration custody promptly after release from criminal custody. Although the crimes of the particular aliens before the court in this case may be minor, this reading would apply to all cases, no matter how grave the crime, based on the arbitrary and irrelevant circumstance of when the federal immigration authorities were able to take the released felon into custody. It would apply to rapists and kidnappers just as much as to marijuana possessors.

Inevitably, some felons wrongly released under this misinterpretation will victimize innocent people. Such victimization in crimes that are entirely preventable is contrary to the interests CJLF was formed to protect.

## SUMMARY OF ARGUMENT

On its face, 8 U. S. C. § 1226(c) describes a group of aliens, who are subject to mandatory detention pending removal, by what they have done. Paragraph (1) has clearly separate "who" and "when" provisions, and the "when" is not naturally read as limiting the "who." The Ninth Circuit's reading is far from the only plausible reading, as that court claims; it is not a plausible reading at all.

The history of § 1226(c) and its predecessor demonstrates that Congress did not intend the "when" clause to be a limitation on the "who." At times this has been clear from the wording beyond any doubt, and at others the wording has been susceptible to the same strained reading the Ninth Circuit gave in this case. Yet these variations have been made without comment on the point in the committee reports, evidently because the

strained reading never occurred to the committees drafting the changes.

## ARGUMENT

### I. Non-releaseable criminal aliens are "described" by the "who" clause of § 1226(c)(1), not the "when" clause.

*A. What, Who, and When.*

Paragraph (c)(2) of 8 U. S. C. § 1226 provides that "[t]he Attorney General may release an alien described in paragraph (1) only if" narrow conditions regarding witness protection and non-dangerousness are met. This paragraph is both an authorization and a prohibition. The "may" authorizes the Attorney General to release the alien if the conditions are met, and the "only" forbids him to release the alien if they are not. See *Jennings* v. *Rodriguez*, 583 U. S. __, 138 S. Ct. 830, 847 (2018).

The crux of this case is the meaning of "an alien described in paragraph (1)." That paragraph is both an authorization and a command. The command includes both a "who" and a "when." Congress commands the Attorney General to take certain aliens into custody, described in the four subparagraphs (A) through (D)[2] following the word "who," and after those four subparagraphs Congress directs that this be done "when the alien is released . . . ."

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2. Modern federal statutes have a hierarchical structure of subsections (a, b, c . . .), paragraphs (1, 2, 3 . . .), subparagraphs (A, B, C . . .), clauses (i, ii, iii . . .), and subclauses (I, II, III . . .). See House of Representatives, Office of the Legislative Counsel, Manual on Drafting Style § 312 (1995).

The statutory direction that the Attorney General take these aliens into custody implies a grant of authority that he do so. In the real world, it is not possible that every alien in the large category of aliens encompassed by the subparagraphs be apprehended immediately, raising two closely related questions. Does the Attorney General's authority under paragraph (1) lapse after some not-yet-defined interval? Is an alien who is within the description of paragraph (1)'s "who" clause nevertheless excluded from the class of "alien[s] described in paragraph (1)" by the happenstance that the Attorney General did not succeed in complying with the "when" clause? *Amicus* submits that the answer to both questions is no.

In normal usage, a direction of what to do regarding whom and when to do it does not imply that the "when" limits the "whom," nor does it imply that if the "when" condition cannot be met the act should not be performed at all. In the present case, the Ninth Circuit quoted a useful example from an earlier district court decision: " 'if a wife tells her husband to pick up the kids *when* they finish school, implicit in this command . . . is the expectation that the husband is waiting at the moment' school ends. *Sanchez-Penunuri v. Longshore*, 7 F. Supp. 3d 1136, 1155 (D. Colo. 2013) . . . ." App. to Pet. for Cert. 21a (emphasis in original).

Yes, that is the expectation, but what if it is not possible to meet? If the husband is stuck in a traffic jam so that he cannot arrive at the school until a half hour later, does he say that compliance with the direction is impossible and go straight home, leaving the kids at the school? Of course not. Varying the hypothetical slightly, if the driver is not the kids' father but instead a third party who needs authorization from a parent to pick up the kids, would we say that the driver is no longer authorized because he did not meet the time

requirement, and again he should just leave them? Of course not. Although the expectation is prompt pick-up, "better late than never" goes without saying.

"Pick up the kids when they finish school" maps precisely to "take custody of certain criminal aliens when they are released." Both are what-who-when. The kids are the "who" in the example, and the aliens specified in subparagraphs (A)-(D) are the "who" of the statute. Neither the command nor the authorization are negated by noncompliance with the time requirement. The kids, or the aliens, to be picked up are the same people, timely or not. The "when" is part of the command, but it is not an all-or-nothing command, and it is not a limit on the authorization.

*B. The Inadmissibles.*

A closer look at subparagraphs (A) through (D) confirms that the "when" clause cannot be a limitation on the authority to detain. As described in detail in Part II, § 1226(c) has its roots in a provision limited to aliens who were convicted of aggravated felonies after admission, but it was subsequently amended to include persons who are inadmissible by reason of actions prior to their entry into the United States. These added provisions would be rendered nearly void if there is a conjunctive requirement of release from custody.

On June 3, 2000, Mohamed Atta entered the United States on a tourist visa, enrolled in flight training, and applied to change from tourist to student status. See National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report 224 (2004) ("9/11 Report"). He was not in custody at any time while he was in the United States. See *id.*, at 224-231, 241-253 (describing travels and preparation). The only police contact noted in the report is a traffic stop. See *id.*, at 231.

On September 11, 2001, Atta and others hijacked American Airlines Flight 11. Atta took the controls and crashed the plane into the World Trade Center. *Id.*, at 4-7.

Atta was a member of a terrorist organization, see 9/11 Report, at 165-167, inadmissible under 8 U. S. C. § 1182(a)(3)(B) and deportable under 8 U. S. C. § 1227(a)(4)(B). Subparagraph (D) of § 1226 (c)(1) brings such members within the "who" of that paragraph. If his membership had been known, it would surely have been the duty of the Attorney General to take him into custody. Indeed, if Mohamed Atta is not within the class that Congress intended to be detained under subparagraph (D), it is hard to imagine who is.

Yet if the "who" of paragraph (c)(1) is further limited by the "when," Atta would not be within the defined class. It would not be possible to take him into federal custody "when . . . released" because he was never released. The possibility of taking subparagraph (D) aliens into custody when released depends on the happenstance of their being in custody to start with, probably for reasons unrelated to the reason they are inadmissible and deportable. That cannot be a criterion for defining the class of persons to whom paragraph (c)(1) applies.

The Ninth Circuit based its interpretation in part by concluding that in the case of criminal aliens released from prison, limiting the class to those detained promptly upon release was "consistent with Congress's purposes in enacting the mandatory detention provision . . . ." App. to Pet. for Cert. 22a. That conclusion is dubious enough on its face, but it is heavily outweighed by the policy considerations in the case of aliens whose deportability do not depend on a criminal conviction. The Ninth Circuit's interpretation leads to a result that

negates any purpose for including those categories in subsection (c)(1).

Simply on the face of the present statute, without any need for legislative history or deference to the Board of Immigration Appeals, the idea that the "when" clause limits the Attorney General's authority to detain or the restriction on release should be rejected.

## II. The legislative history does not support the notion that Congress intended to grant criminal aliens an exemption from § 1226(c)(1) merely because they were not arrested immediately.

The Ninth Circuit is quite certain that "Congress's concerns over flight and dangerousness are most pronounced at the point when the criminal alien is released." App. to Pet. for Cert. 22a. Combing through the bills that enacted and amended this provision and its predecessor and the accompanying hearings and reports, *amicus* has not found a single shred of evidence that Congress ever believed that its concerns diminish with the passage of time alone.

The year before the enactment of the predecessor provision, a Senate committee on Federal Spending, Budget, and Accounting held a hearing on the problem of criminal aliens. Senator Chiles, the chair, noted the problem of aliens engaged in drug trafficking posting bond and going right back to the drug trade. See Illegal Alien Felons: A Federal Responsibility, Hearing before the Subcommittee on Federal Spending, Budget, and Accounting of the Senate Committee on Governmental Affairs, S. Hrg. 100-344, 100th Cong., 1st Sess., 2 (1987). This is not a problem that diminishes with time.

The notion that a released criminal is no longer a danger simply because he is not rearrested soon after release is contrary to both common sense and established facts. The Bureau of Justice Statistics recently released data on recidivism with a 9-year follow-up period. "Almost half (47%) of prisoners who did not have an arrest within 3 years of release were arrested during years 4 through 9." U. S. Dept. of Justice, Bureau of Justice Statistics, 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014) (2018).

A few of the 47% may have "gone straight" for three years and then returned to crime in the outyears, but it is probably much more common that a recidivist simply evaded capture in the early years but eventually slipped up. After all, less than half (45.6%) of violent crimes are cleared, and less than a fifth (18.3%) of property crimes are cleared. See Federal Bureau of Investigation, 2016 Crime in the United States: Clearances 2, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/clearances.pdf (as visited June 4, 2018).

It is entirely consistent with the policy behind this statute to guarantee that an alien convicted of one aggravated felony will not commit another while waiting removal proceedings. An exception might be crafted for those who are demonstrably reintegrated into the community and living productive, law-abiding lives, cf. App. to Pet. for Cert. 3a, but Congress has not crafted one for those covered by § 1226(c)(1), and lapse of time alone does not come close to being an adequate proxy.

The Appendix traces the evolution of what is now 8 U. S. C. § 1226(c). It was originally enacted as 8 U. S. C. § 1252(a)(2) in the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 7343, 102 Stat. 4470. It was

only two sentences. The first required the Attorney General to "take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence," and the second flatly forbade release of "such felon." The term "such felon" would most naturally refer only to the criterion of having committed an "aggravated felony" without reference to when the felon was taken into immigration custody, but one might stretch to find the same ambiguity that could be found in the present statute.

Two years later, the provision was amended in the Immigration Act of 1990, Pub. L. 101-649, § 504, 104 Stat. 5049. The amendment was added to S. 358 in the conference committee, and its report notes tersely, "The Conference substitute includes a number of provisions designed to assist INS in the identification, apprehension and deportation of criminal aliens." H. Rep. No. 101-955, 101st Cong., 2d Sess., 132 (1990).

The language was lifted verbatim from the Comprehensive Crime Control Act of 1990, H. R. 5269. See H. Rep. No. 101-681, pt. I, 101st Cong., 2d Sess., 300-301 (1990). The report describes the 1988 law as one that "ordered the INS to detain every alien convicted in the United States of an aggravated felony . . . ." *Id.*, at 147. "Every" does not mean "every one that can be and is detained promptly." It means every one. The amendment rejected the decision of an immigration judge that the direction to detain upon completion of sentence meant that the INS had to wait until the completion of any post-release parole term, see *id.*, at 148, changing "upon completion" to "upon release," with a parenthetical leaving no doubt that this excluded parole and similar conditions. See Appendix, ¶ 2, p. 1a. Congress did soften the provision for permanent resident aliens by allowing release on bond for those

determined to be neither dangerous nor a flight risk, adding a subparagraph (B) to that effect.

The provision was amended again the following year in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, § 306(a)(4), 105 Stat. 1751. This amendment expanded the discretionary release provision to all lawfully admitted aliens, not just legal permanent residents. More importantly for the present case, the 1991 version of subparagraph (B) had no ambiguity on the point now at issue (emphasis added):

> "(B) The Attorney General may not release from custody *any lawfully admitted alien who has been convicted of an aggravated felony*, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."

This version unmistakably bases the restriction on release solely on the conviction of an aggravated felony with no reference to the take-custody paragraph or the time of taking custody. See *In re Rojas*, 23 I. & N. Dec. 117, 123 (BIA 2001). Yet the committee report on the bill from which this language was taken refers only to expanding the discretionary release exception beyond the permanent resident group with no mention of deleting a timing limitation on the covered class. See H. Rep. No. 102-383, 102d Cong., 1st Sess., 7 (1991), *reprinted in* 1991 U. S. Code Cong. & Admin. News at 1378.

Four years later, in April 1995, a Senate report noted that this " 'technical amendment' " (with quotes implying it was much more than technical) weakened the 1988 Act by this expansion of the discretionary

release exception. See S. Rep. No. 104-48, 104th Cong., 1st Sess., 12 (1995). Yet again, the report made no mention of expanding the scope of the no-release rule by eliminating a timing requirement for the rule to apply. See *ibid*. Evidently, neither the 1991 committee nor the 1995 committee read the 1988 and 1990 versions of the statute as having had a timing limitation on detention authority or eligibility for release in the first place. Later that month, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 440(c), 110 Stat. 1277, repealed the discretionary release subparagraph altogether.

The AEDPA version was soon replaced by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Consolidated Appropriations Act, Pub. L. 104-208, 110 Stat. 3009-546. That act reorganized the portion of the Immigration and Nationality Act at issue in this case. Section 303(a), 105 Stat. 3009-585, moved the § 1252(a)(2) language to § 1226(c) [INA § 236], updated the references to other sections of the act also being renumbered, added additional grounds of inclusion in the covered class, and broke out the grounds in subparagraphs for better readability. A narrow discretionary release provision was added, limited to witness protection cases. However, in section 303(b), Congress also provided a transition rule triggered by a finding of "insufficient space for detention." This rule is reproduced in the Appendix, ¶ 3(d), p. 5a. The transitional rule unambiguously has no time-of-custody requirement for discretionary release. It refers to aliens described in two particular clauses of subparagraphs (A) and temporarily reinstates the pre-AEDPA discretionary release for lawfully admitted aliens described in those subparagraphs, as well as those who cannot be deported due to lack of cooperation from their home countries.

If a time-of-release rule really were bound as tightly to congressional policy objectives as the Ninth Circuit opinion claims, it seems very odd that the rule is turned on and off at several points in the history of the law with no mention of such a change in any report. More likely, there is no mention because there is no such rule. From the beginning, the no-release rule has applied to all aliens who meet the substantive criteria of the law, which in the present version are subparagraphs (A) through (D) of paragraph (1).

## CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

June, 2018

Respectfully submitted,

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# APPENDIX

History of 8 U. S. C. § 1226(c), formerly § 1252(a)(2), with additions in *italics* and deletions in ~~strikeout~~.

1. As added by an amendment to 8 U. S. C. § 1252(a) [Immigration and Nationality Act § 242(a)], Pub. L. 100-690, Anti-Drug Abuse Act of 1988, § 7343, 102 Stat. 4470, Nov. 18, 1988:

> (2) The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction. Notwithstanding subsection (a), the Attorney General shall not release such felon from custody.

2. As amended by Pub. L. 101-649, Immigration Act of 1990, § 504, 104 Stat. 5049, Nov. 29, 1990:

> (2) *(A)* The Attorney General shall take into custody any alien convicted of an aggravated felony ~~upon completion of the alien's sentence for such conviction~~ *upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense).* Notwithstanding ~~subsection (a)~~ *paragraph (1) or subsections (c) or (d) but subject to subparagraph (B),* the Attorney General shall not release such felon from custody.
>
> *(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.*

3. As amended by Pub. L. 102-232, the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, § 306(a)(4), 105 Stat. 1751:

> (2) (A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) or (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.
>
> (B) The Attorney General ~~shall~~ *may not* release from custody ~~an alien who is lawfully admitted for permanent residence~~ *any lawfully admitted alien who has been convicted of an aggravated felony* ~~on bond or such other conditions as the Attorney General may prescribe~~, *either before or after a determination of deportability,* ~~if the Attorney General determines~~ *unless the alien demonstrates to the satisfaction of the Attorney General* that ~~the~~ *such* alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

4. As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 440(c), 110 Stat. 1277:

> (2) ~~(A)~~ The Attorney General shall take into custody any alien convicted of ~~an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense)~~ *any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C), or (D), or any offense*

*covered by section 1251(a)(2)(A)(ii) for which both predicate offenses are covered by section 1251(a)(2)(A)(i), upon release of the alien from incarceration, shall deport the alien as expeditiously as possible.* Notwithstanding paragraph (1) or subsections (c) or (d) ~~but subject to subparagraph (B)~~, the Attorney General shall not release such felon from custody.

~~(B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.~~

5. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Omnibus Consolidated Appropriations Act, Pub. L. 104-208, reorganized and revised this part of the Immigration and Nationality Act:

(a) Section 305(a)(2) of the IIRIRA, 110 Stat. 3009-598, redesignated 8 U. S. C. § 1251 [INA § 241] (referred to in the AEPDA version, above, to designate the covered offenses) as § 1227 [INA § 237].

(b) Section 306(a), 110 Stat. 3009-607, enacted a new § 1252 titled Judicial Review of Orders of Removal.

(c) Section 303(a), 110 Stat. 3009-585, rewrote 8 U. S. C. § 1226 [INA § 236] with subdivision (c) being a revision of former § 1252(a):

*(c) DETENTIO[illegible] OF CRIMINAL ALIENS.—*

*(1) CUSTODY.*—The Attorney General shall take into custody any alien ~~convicted of any criminal offense covered in section 1251(a)(2)(A)(iii), (B), (C),~~

~~or (D), or any offense covered by section 1251(a)(2)(A)(ii) for which both predicate offenses are covered by section 1251(a)(2)(A)(i),~~ *who—*

*(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2),*

*(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D),*

*(C) is deportable under section 1227(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or*

*(D) is inadmissible under section 1182(a)(3)(B) or deportable under section 1227(a)(4)(B),*

~~upon release of the alien from incarceration, shall deport the alien as expeditiously as possible~~ *when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.*

~~Notwithstanding paragraph (1) or subsections (c) or (d) , the Attorney General shall not release such felon from custody~~.

*(2) RELEASE.—The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney*

*General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.*

(d) Section 303(b), 110 Stat. 3009-586, provided the following transitional rule for the first year after enactment and a possible additional year extension if the Attorney General determined there was insufficient space for detention:

(3) TRANSITION PERIOD CUSTODY RULES.—

(A) IN GENERAL.— During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who—

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, [8 U. S. C. § 1101(a)(43)] as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act [8 U. S. C. § 1182(a)(2)],

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act [former 8 U. S. C. § 1251(a)(2)(A)(ii), (A)(iii), (B), (C), (D)] (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle),

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to

whether the alien may be arrested or imprisoned again for the same offense.

(B) RELEASE.—The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and—

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.